C.A.C. No. 129111

NOVA SCOTIA COURT OF APPEAL

Cite as R. v. Hurley, 1997 NSCA 53

Pugsley, Jones and Flinn, JJ.A.

BETWEEN:

ROBERT WALLACE HURLEY	)	William P. Burchell
	)	for the Appellant
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	Christine Kilfoil/Marion Fortune-Stone
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
	)	
Respondent	)	
	)	
	)	Appeal Heard:
	)	November 22, 1996
	)	
	)	Judgment Delivered:
	)	January 28, 1997
	)	
	)	

Revised Decision: This decision has been revised according to an erratum which removed the third full paragraph on page 10 beginning with "I conclude that Mr. Hurley's vital interests....". This decision replaces the previously distributed decision

THE COURT: The appeal is dismissed, per reasons of Pugsley, J.A.; Jones and Flinn, JJ.A. concurring.

Pugsley, J.A.:

Robert Hurley appeals from his conviction by a jury on May 23rd, 1996, that he, unlawfully, had in his possession a kind of manufactured tobacco or cigars, not put up in packages and stamped with tobacco stamps or cigar stamps in accordance with the provisions of the **Excise Act**, R. S. c.E-12, and the departmental regulations and did thereby commit an offence, contrary to section 240 of the **Excise Act**. The trial judge imposed a fine of $23,000 or one year in default.

The grounds of appeal may be summarized as follows:

1. The trial judge erred in law by permitting questions to be directed to the jury panel in Mr. Hurley's absence, thereby depriving him of his fundamental right to be present for the whole of his trial, contrary to the provisions of s. 650(1) of the **Criminal Code**, R.S.C. 1985, c. C-46;

2. The trial judge wrongfully deprived Mr. Hurley of his common law right to be tried by a jury of 12 persons, by failing to replace a juror discharged before the trial commenced;

3. The trial judge erred in law by prohibiting Mr. Hurley's counsel from commenting in his closing address to the jury upon the nature and extent of the penalty avoided by key Crown witnesses in exchange for their agreement to testify against Mr. Hurley, thereby depriving the jury of information which could have affected their assessment of the witness's credibility;

4. The trial judge erred in his charge to the jury by failing to adequately instruct the jury as to how to consider the circumstantial evidence and in failing to review the evidence and give to the jury the theory of the defence.

First Ground of Appeal

After the jury array was polled on the morning of May 21, 1996, the following occurred:

> The Court: Ladies and gentlemen, this is a term of the Supreme Court of Nova Scotia. There are a number of cases on the docket, but there is only one case which involves a jury trial. The case is **The Queen v. Robert Wallace Hurley** . . . I am going to call in a few minutes for persons who seek an exemption from jury duty. Those persons will come forward and give reasons under oath why they feel they require an exemption. . . . Twelve of you will be picked for the case which starts today, and once the 12 have been picked, the rest of you will be discharged because there aren't any more cases.
>
> You will have noticed that there were statutory reasons why you should be exempt, and I'm not going to read them because you would have received them with your notice. You are exempt if you are not a Canadian citizen and have not resided in the county for more than a year. Also, obviously, if there is a serious hearing impairment you should claim exemption. Subsequent to asking for general exemptions, I will ask Mr. MacPhee, the Crown Prosecutor, to name the names of the witnesses for the Crown and then if any person has any close connection with witnesses or with the accused, of course, they should come forward as well, but that will be done after I seek your general exemption. Accordingly, if there are persons who wish to seek an exemption perhaps they should come forward and they will be sworn.

Five prospective jurors sought exemption, for reasons varying from inability to obtain a babysitter for small children at home, preparation for final exams, and presence in another court required under subpoena. The individuals were questioned by the trial judge, although not apparently under oath as the trial judge had earlier suggested would be the procedure. Four of the five applying for exemptions were excused. Counsel took no part in questioning the applicants, but were present to hear the dialogue (subsequently transcribed) between the applicants and the trial judge.

The trial judge then stated:

> I guess, Mr. MacPhee, perhaps you should read the names of the witnesses and please, would you pay close attention to Mr. MacPhee. What I am doing and what he is doing is reading the names of the witnesses, and if you have any close connection with any of these witnesses, please let me know. Come forward and tell me what that connection is, okay?

Crown counsel then read aloud the names of those witnesses he anticipated calling at trial.

The Court then addressed defence counsel:

> Mr. Burchell, you can remain silent if I make this request, but if there is persons that you wish to reveal to the Court about whom you may call, feel free to do so.
>
> Mr. Burchell: Thank you. We will not be saying anything at this point.

The procedure adopted by the trial judge while determining exemptions for hardship, was then followed when exemptions for those with "close connections" were considered. Four individuals who sought exemption in response to the Court's invitation were then excused, after a discussion with the trial judge. The discussion took place in the presence of counsel. None of the applicants was sworn. The fifth applicant advised the Court that he knew Mr. Hurley and the trial judge responded:

> That's something I perhaps didn't - also persons who know Mr. Robert Wallace Hurley or are closely connected with him, should come forward as well.

Four more applicants who requested exemption were then excused. Thus, of a total of eight applicants requesting exemption for partiality, all were excused - five because they had an association with Crown witnesses, and three because of association with Mr. Hurley.

The following transpired:

The Court:	We'll now call for the criminal trial, **The Queen v. Robert Wallace Hurley.** Mr. MacPhee do you move for the arraignment?
Mr. MacPhee:	Yes, My Lord.
	. . .
The Court:	Would the clerk read the indictment please and Mr. Hurley would you please stand up.
Mr. Burchell:	We're finding him, My Lord. He's apparently outside.
The Court:	Has he not been in the courtroom?
Mr. Burchell:	I gather not, for insufficient room in the inn. I'll get him to sit here until we clear a spot for him.
The Court:	Mr. Hurley, you are to remain in this courtroom until such time as I leave the courtroom. Do you understand that? From now on.
Mr.Hurley:	Yes. There were no seats before.
The Court:	I don't care. Find a seat. All right?
Mr. Burchell:	I don't think it was intentional, My Lord.

Mr. Hurley was then arraigned on the sole count of the indictment and entered a plea of "not guilty". The jury selection was completed, the jury was sworn, and the

clerk read over the indictment and plea, and Mr. Hurley was then placed in the jury's charge.

At the conclusion of the trial judge's preliminary remarks, the jury was dismissed until 2:00 in the afternoon so that the trial judge could conduct a *voir dire* respecting the admissibility of certain evidence.

At the conclusion of the *voir dire*, while the jury were still absent, Mr. MacPhee, counsel for the Crown stated:

> Perhaps this isn't an appropriate time to bring this up, but it is a concern to the Crown and if there is some remedial action we can take now to save the day, then I would like to air it out. The problem with the accused not being in the room for the selection, for the examination of the jury for exemptions this morning, and really, I think he was absent from the room for the selection of the jury.
>
> The Court: No, no, he wasn't, not for the selection of the jury. You were conferring with him . . .
> Mr. Burchell: The only thing, it was only exemptions.
> The Court: The only thing he was absent for was the general exemptions and he wasn't arraigned. The trial didn't start until he was arraigned. . . .
> The accused is entitled to be here and has to be at trial . . . after the trial has started . . . the trial was not started here until after the accused was arraigned, but in the meantime, what have you got to suggest?
> Mr. MacPhee: Well, that's it, I don't have anything to suggest.
> The Court: No, you don't have anything to suggest. Nothing that can be done about it, but he should have been in the room. Mr. Burchell, you should have made sure he was in the room.
> Mr. Burchell: I thought he was, My Lord. I looked around, but unfortunately there were so many people here at that point, I couldn't see him.

There was no further discussion on this point.

Analysis

Prior to 1992, it was common practice for a trial judge to ask members of the jury array, if any had a close connection to a party, or to a witness who was to testify, that would lead to their disqualification because of a lack of impartiality. The practice was approved by the Supreme Court of Canada in **R. v. Hubbert** (1975), 29 C.C.C. (2d) 279

(Ont. C.A.) aff'd, [1977] 2 S.C.R. 267, on the basis that it was a proper exercise of the power of the trial judge to ensure a fair trial.

The Supreme Court of Canada later commented that the procedure should be limited to cases involving non-controversial, or obvious, situations of partiality (**R. v. Sherratt** (1991), 63 C.C.C. (3d) 193, per L'Heureux-Dubé, for the majority, at 205 and 208).

The practice was codified when s.632 of the **Criminal Code** came into effect in July of 1992 (see notes in *Martin's Annual Criminal Code, 1997*, p. 932).

Section 632 provides:

> The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or any challenge has been made in relation to the juror, for reasons of
>
> (a) personal interest in the matter to be tried;
>
> (b) relationship with the judge, prosecutor, accused, counsel for the accused, or a prospective witness; or
>
> (c) personal hardship or any reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

In considering this first issue, s. 650(1) of the **Code** is relevant. It provides:

> Subject to subsections (1.1) and (2), an accused other than a corporation shall be present in court during the whole of the accused's trial.

There have been a number of cases that deal with the meaning of the phrase "whole of the accused's trial", as well as the phrase "course of a trial", as it appears in s. 644 of the **Code**.

For example, in **R. v. Basarabas** (1982), 2 C.C.C. (3d) 257 (S.C.C.) Dickson, J. (as he then was) writing for the Court, stated:

> The question of fixing the time of the commencement of a jury trial has been the subject of some difficulty in the past. It seems possible, however, on the authorities and on principle to reach the following conclusions:
>
> First, the time of commencement of a jury trial will vary according to the circumstances and the language of the section of the **Criminal Code** being applied.
>
> . . .

> Finally, the weight of authority supports the position of the accused that a jury trial commences when the accused has been placed in charge of the jury.

In this case, at the time the presiding judge considered exemptions, the accused had not been placed in the charge of the jury, in fact he had not been arraigned nor had he pleaded. The issue between Mr. Hurley and the Crown had not been joined. In **King v. Walsh** (1914), N.S.R. 1, Graham, E.J., in response to the question "When does a trial commence?" referred to the opinion of Story, J. in **U.S. v**. **Curtis**, 4 Mass. 236:

> Now in the sense of the common law, the arraignment of the prisoner constitutes no part of the trial. It is a preliminary proceeding and until the party has pleaded, it cannot be ascertained whether there will be any trial or not.

Justice Salhany, in his text, *Canadian Criminal Procedure (6th ed.)* at p.6-80) infers that the pre-screening exercised under s. 632 should take place after the accused has pleaded but before the accused is placed in the charge of the jury. This would appear to be a sensible practice with respect to those claims for exemption arising under s. 632(a) or (b). Claims for exemption under s. 632(c), however, which are based on personal hardship or any other reasonable cause, such as a medical disability, are usually considered before arraignment and not in the presence of the accused (discussion paper prepared for judges of the Supreme Court of Nova Scotia, Trial Division, and judges of the County Court, October 22, 1992).

In the present case, one might reasonably speculate how prospective jurors could decide if they had a "close connection" with Mr. Hurley, since no address had been given for him, he had not entered a plea, and he was not present in the court room to be viewed. His absence apparently presented no problem as three prospective jurors were excused on the ground that they knew, or had an association with, him. The proximity of Sydney, where the trial was conducted, to New Waterford, Mr. Hurley's residence, as well as the relatively small population of each centre, is, presumably, the explanation for those claiming exemption on this ground.

Chief Justice Dickson pointed out in **R. v. Barrow**, [1987] 2 S.C.R. 694 at 704, that the reason for the different interpretations of the commencement of a jury trial is that:

> . . . different sections of the **Code** protect different interests . . . if the jury has heard no evidence, as in **Basarabas**, then a juror can be replaced and s. 573 should not be used. "Trial" there refers to the heart of the trial, the presentation of evidence before the trier of fact. S. 577 (the predecessor to s. 650(1)) however, protects different interests and in my opinion should be given an expansive reading. The words "whole of his trial" mean just that, the whole of the trial.

Counsel for Mr. Hurley submits that this broad interpretation of the phrase "whole of the accused's trial" given by Chief Justice Dickson should determine this first issue in his client's favour.

The additional comments of the Chief Justice, in **Barrow**, at pp. 705 and 708, lend some support to this contention:

> In my view the examination of prospective jurors by the trial judge, relating in part to their partiality and following arraignment and plea, formed part of the trial for the purposes of section 577 . . . any question about the partiality of the jurors individually or the jury as a whole reflects on the substantive conduct of the trial and must be dealt with in the presence of the accused.

Justice Salhany citing **Barrow** as authority comments at p. 6-81:

> Although s. 632 does not indicate whether the pre-screening procedure must be done in open court, it is submitted that it should be done in open court in the presence of the accused. The accused is at least entitled to be present to see every step of the procedure that affects his interest and to ensure that the correct procedure is followed. . . .

I am of the opinion that Chief Justice Dickson's comments in **Barrow**, are not of assistance to Mr. Hurley.

The facts in the two cases are distinguishable in several critical areas. In **Barrow**, <u>after</u> arraignment and plea, the presiding judge, over the objection of defence counsel, refused to conduct, within the hearing of counsel and the accused, discussions with prospective jurors who claimed exemption. Some of the claims for exemption were based on the complaint of "hardship", but others, significantly, were based on exposure to pre-trial publicity. These latter claims do not come within the categories enumerated

in s. 632, nor was the presiding judge in this case required to consider any requests for exemption based on this ground, or any other ground, that would be considered to be of a controversial nature.

Since the decision in **Barrow**, the Supreme Court of Canada has considered a number of cases where proceedings conducted in the absence of an accused are nevertheless held to be valid.

For example, in **R. v. Chambers** (1990), 59 C.C.C. (3d) 321(S.C.C.), the trial judge discharged a juror, six weeks into the trial, after receiving a telephone call from the juror's doctor advising that the juror would not be available for at least a week because of illness. Justice Cory's comments for the majority, at p. 332, are apposite:

> It would thus seem that the accused should be present when the decision is made to discharge a juror for reasons of health. Yet, although that may be the preferable procedure, it is not absolute. Some proceedings that are taken in the absence of the accused may be properly excused . . . Excusing a juror for reasons of illness or hardship cannot reasonably be said to have a bearing on the substantive conduct of the trial or the guilt or innocence of the accused which is fundamental . . . (emphasis added)

Chief Justice Lamer emphasized the same point in **R. v. Tran** (1995), 92 C.C.C. (3d) 217 (S.C.C.). Speaking on behalf of the Court, the Chief Justice said at page 237:

> For a violation of the right to be present under s. 650 to be made out, it is enough that an accused was excluded from the part of the trial which affected his or her vital interests. (emphasis added)

Unlike **Barrow**, the exemptions for hardship, in the instant case, were considered in the presence of counsel. Four of the five individuals applying for exemption were excused. None of the exemptions considered by the presiding judge was of a controversial nature.

All eight requests for exemption on the ground of close connection to Crown witnesses, or the accused, were granted. Counsel for Mr. Hurley, an experienced counsel, was present, and could hear the exchange between the presiding judge and

those seeking exemption. No request was of a controversial nature. This point was emphasized some hours later when Mr. Hurley's counsel advised the Court:

> The only thing, it was only exemptions.

While counsel's acquiesence, at trial, to the position taken by the trial judge, is a factor to be considered by this Court, the determining factor on this issue in my opinion is that Mr. Hurley's vital interests, unlike those in **Barrow**, were not at stake when the exemptions were considered. The consideration of these exemptions could not reasonably be said to have had a bearing on the substantive conduct of the trial, or on Mr. Hurley's guilt or innocence.

An examination of Chief Justice Dickson's reasoning in **Barrow** for granting a new trial persuades me, as well, that this case should be distinguished.

The Chief Justice emphasized two principles that provided the rationale for s. 650(1):

> First, the accused is present to hear the case he or she faces and is thereby able to put forward a defence. Second, the accused sees the entire process by which he or she is tried and is able to see that the correct procedure is followed and the trial fair.
>
> For Martin, J.A. the second principle was the more important one. I agree with him that this second value is of enormous importance to the perceived fairness of the Canadian criminal justice system. The sight of a judge conferring in private with jurors on issues that go to the partiality of the trier of fact can only prompt cynicism in an accused. It should be avoided.

Mr. Hurley's absence from the court room did not affect his ability to put forward his defence. The discussion between the presiding judge and those seeking exemption involved non-controversial situations of partiality and were conducted in open court within the hearing of Mr. Hurley's counsel.

These principles, as the Chief Justice indicated, were first enunciated by Martin, J.A. of the Ontario Court of Appeal in **R. v. Hertrich** (1982), 67 C.C.C. (2d) 510 (leave to appeal to the Supreme Court of Canada refused, [1982] 2 S.C.R. x).

The actual words used by Justice Martin in **Hertrich**, while commenting on the second principle underlying the section, are pertinent, at p. 527:

> Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first hand knowledge of the proceedings leading to the eventual result of the trial. The denial of an opportunity to an accused may well leave him with a justifiable sense of injustice. (emphasis added)

Any sense of injustice professed by Mr. Hurley in this case would, in my opinion, be entirely unjustified. He had a duty to be present at the court room. He chose to remove himself. He was not denied the opportunity to be present. The only explanation offered by him when he returned was that "there were no seats before". He could have requested a chair from the clerk, he could have remained standing, or at the very least he could have spoken to his counsel. He knew the trial was scheduled for one purpose and that was to determine his guilt or innocence. He deprived himself of first hand knowledge of the proceedings.

I conclude that the presiding judge in considering and ruling on non-controversial claims for exemption before the commencement of the trial acted within the authorization conferred by s. 632, even though Mr. Hurley was not present. Mr. Hurley's vital interests were not affected, his counsel was present at all times, and his absence was attributable to his own neglect.

Finally, **Barrow** was decided prior to the enactment of s. 686(1)(b)(iv) of the **Code**. That section provides:

> On the hearing of an appeal against a conviction ... , the Court of Appeal . . .
>
> (b) may dismiss the appeal where . . .
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the Court of Appeal is of the opinion that the appellant suffered no prejudice thereby.

If any error was committed, it was merely one of procedure within the meaning of s. 686(1)(b)(iv) and did not violate the jury selection requirements of the **Code** so that it could be maintained that the Court was without jurisdiction to try Mr. Hurley.

I would rely upon the reasoning of the Ontario Court of Appeal in **R. v. Hollwey** (1992), 71 C.C.C. (3d) 314, a case decided before S. 632 came into effect.

In **Hollwey**, after the accused was arraigned, the trial judge considered claims for partiality based on an applicant's personal experience, or opinion, about drugs which would impair his or her ability to act as an impartial juror. Ten individuals claiming exemption on this basis asked to speak to the judge in confidence, not within the hearing of the accused or his counsel. Their request was granted. The prospective jurors were not required to testify under oath and the process took place with the consent of counsel. Two were exempted after a finding of partiality by the trial judge. The Ontario Court of Appeal concluded the exemption, and the process leading up to it, was clearly part of the trial. The prospective jurors were not required to testify under oath and the process took place with the consent of counsel.

Although the Court of Appeal did not expressly state that Mr. Hollwey's vital interests were affected when the trial judge considered, in private, requests for exemption based on personal experiences or opinions respecting drugs, such a conclusion would appear to be justified since the requests for exemption were not based on grounds of obvious partiality, such as considered by the trial judge in this case, but, rather, on grounds that would be reasonably considered controversial.

Justice Arbour, on behalf of the Court, stated at p. 318 and 319:

> This Court held in **R. v. Cloutier** (1988), 43 C.C.C. (3d) 35, that this curative proviso [i.e. s. 686(1)(b)(iv)] is available to remedy an unauthorized absence by the accused from his trial, if the exclusion did not affect adversely to him the outcome of his trial. . . . A brief inadvertent absence during the jury selection process which caused no prejudice to the appellant, is indistinguishable from a similar absence in the course of the trial.

In my opinion, Mr. Hurley's voluntary absence from the Court, while a trial judge in the presence of his counsel granted exemptions to all eight who based their claim on "obvious partiality", if an error,was a procedural error considerably less serious than that considered by the Ontario Court of Appeal in **Hollwey**.

I would adopt the following comments of Justice Arbour in **Hollwey**, at p. 319:

> Even if it could be said that part of the jury selection process proceeded in the absence of the appellant without his express consent, this merely amounted to a procedural error within the meaning of s. 686(1)(b)(iv) of the **Criminal Code**, and not to a departure from the jury selection requirements of the **Code** such as to suggest that the court which tried the appellant was not constituted in accordance with the law and was without jurisdiction to try him.

I would, accordingly, dismiss this ground of appeal.

Second Ground of Appeal

After the conclusion of the *voir dire* on the afternoon of May 21, the trial judge stated that he had been advised by the Sheriff that one of the jurors selected, Patrick Hillgrove, was acquainted with Robert Hines, one of the proposed Crown witnesses. The trial judge then examined Mr. Hines in the presence of counsel and Mr. Hurley. With the agreement of counsel, the trial judge discharged the jury for the day in order to consider the issue.

The following morning the trial judge stated:

> Counsel, I have given thought to the concerns that I had yesterday with respect to that individual juror. I have considered legal authority. It is my view that I should discharge that juror and proceed to trial with the eleven. Comments of counsel?
>
> Mr. Burchell: That seems to be the appropriate procedure, My Lord.
>
> Mr. MacPhee: Yes, My Lord, that appears to be what the cases, not case but the **Code** section in **Salhany**, as well.

The trial judge concluded that the issue arose during the "course of a trial", and accordingly he exercised his discretion to discharge the juror and proceed with the remaining eleven jurors, pursuant to s. 644 of the **Code**.

Section 644 of the **Code** provides:

> 644(1) Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.
>
> (2) Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the judge shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.

Counsel for Mr. Hurley does not quarrel with the discharge of Mr. Hillgrove, but submits that the trial judge erred when he relied on s. 644 as the matter did not arise during the "course of the trial". Counsel stresses that the only event of significance that had occurred at the time the issue was considered, was the opening address of the trial judge to the jury. He points out that the Crown had not opened its case, no witnesses had been called, no evidence tendered, and no exhibits received.

Counsel stresses the following comments of Chief Justice Dickson in **Basarabas**, at p. 265-6:

> . . . insosfar as this section deprives the accused to his common law right to the unanimous verdict of twelve persons, it should be narrowly construed; there is no good reason for denying an accused a full jury where no evidence has been led. It would be undesirable to start a trial with less than that number . . .

Counsel also relies on the comments of Chief Justice Dickson in **Barrow** at p. 704:

> . . . Every effort must be made to avoid a jury of less than twelve members. If the jury has heard no evidence, as in **Basarabas**, then a juror should be replaced, and section 573 should not be used. "Trial" there refers to the heart of the trial, the presentation of evidence before the trier of fact.

Finally, counsel argues that it would have caused very little delay in the proceedings to procure a twelfth juror and for the trial judge to repeat his preliminary remarks already delivered to the panel.

In my opinion, it would not have been practical, or indeed possible, to procure a twelfth juror. This was the only case on the criminal docket. The panel had been

discharged 24 hours earlier. There was no panel of jurors available from which to select a replacement.

The issue was recently considered by this Court in **R. v. Socobasin** (N.S.C.A. October 3, 1996 C.A.C. No. 123584).

In **Socobasin**, after twelve jurors had been sworn, the trial judge discharged the panel.

The Crown prosecutor advised the Court that one of the jurors had a question.

Before the question was considered the clerk read to the jury the charge against the accused and put him in their charge to determine if the accused was guilty or not guilty.

The jury retired and the trial judge determined, with the concurrence of counsel, that the juror should be discharged because of a connection with the victim of the crime.

Counsel for the accused submitted that the juror excused should be replaced as the "panel was barely out the door".

Justice Hallett, writing for the Court, stated at p. 17:

> In 1987 this Court decided **R. v. Richardson** (1987), 39 C.C.C. (3d) 262. Macdonald, J.A. writing for the majority, held that once an accused is placed in charge of the jury, the provisions of s. 573 of the **Criminal Code** applied. Macdonald, J.A. concluded that having discharged the twelfth juror, the only choice open to the trial judge was to proceed with an eleven-member jury or to adjourn the proceedings to another day. There had been already a significant delay in the case and a further delay was to be avoided if possible; it could not be said that the trial judge erred in the exercise of his discretion in continuing the trial. Justice Jones dissented; he concluded that as no evidence had been called up to this point, there was no valid reason for proceeding with the trial with only eleven jurors.
>
> In the course of his reasons, Justice Macdonald referred to the statements made by Dickson, J. in **Basarabas** that an accused should not be lightly deprived of his or her right to be tried by a jury of twelve persons. Justice Macdonald then stated at p. 266:
>
> > As a general rule, an appellate court will not interfere with the exercise of a judge's discretion to discharge a juror since, having had the benefit of statements of counsel and having heard the evidence with the full appreciation of the atmosphere in which the trial takes place, he is clearly best able to determine the effects of events on the jury - *Canadian Criminal Procedure* by the Hon. Roger E. Salhany, 4th ed. . . . It is true that Chief Justice Dickson did express in **Basarabas** the opinion that "there is no

> good reason for denying an accused a full jury where no evidence has been led". I do not believe, however, that he intended to restrict the operation of s. 573 to those cases only in which evidence had been introduced. Such restrictive interpretation is contrary to the plain meaning of this section - namely, that a trial judge has a discretion exercisable during the trial to discharge up to two jurors and proceed with a reduced panel . . . The issue then is, did the learned trial judge commit reversible error in the exercise of the discretion given him by s. 573(1) of the **Code**.

Justice Hallett concluded at p. 26:

> Section 644 provides a mechanism for the discharge of a juror in the course of a trial. When Dickson, C. J. stated that every effort ought to be made to replace a juror who is discharged before the calling of evidence, he obviously meant every reasonable effort. . . considering the situation facing the trial judge, he acted reasonably and this court ought not to interfere with his ruling on the problem that confronted him. An accused has a right to be tried by twelve jurors but Parliament has provided a mechanism that during the course of the trial a trial judge may discharge a juror. The plain meaning of s. 644 authorized the trial judge to act as he did in these circumstances.

In my opinion the comments of Justice Hallett are directly applicable to this second issue. I would accordingly dismiss this ground of appeal.

Third Ground of Appeal

Counsel for Mr. Hurley submits the trial judge erred in law by prohibiting him from advising the jury of the substantial penalties provided in the **Excise Act**, and the **Tobacco Tax Act**, avoided by two key Crown witnesses, the MacDougall brothers, when the Crown dropped charges against them in exchange for their agreement to testify against Mr. Hurley. Each of the Crown witnesses admitted in cross-examination that he had been charged with offences under the two **Acts** as a result of being found with boxes of product subsequently traced to Mr. Hurley.

In the course of disallowing counsel's proposal, the Court commented:

> Well, you can go to the jury with the argument that here is a couple of persons who were charged with the same offence as your client, and the evidence is that the arrangement, or part of the arrangement, is that they would testify against the accused. I suppose you could go so far as to suggest that that's to their benefit, with respect to what may or may not have developed, but I don't want you to mention the particular fines. There is no evidence of the fines. It's not a matter that I can consider can properly go before the jury.

I agree with the Crown's contention that:

> Such comments [on behalf of Mr. Hurley] would, at that state, have been purely speculative in the absence of a conviction. As noted by Crown counsel at trial, there is no certainty of convicting [the] witnesses, given their testimony that they were told by [Mr. Hurley] the boxes contained ceramic tiles, the boxes were marked ceramic tiles and they believed that is what they were transporting.

In the course of a brief cross-examination, counsel for Mr. Hurley directed the following questions to one of the witnesses:

> Q. You were also charged?
> A. Yes.
> Q. Is that correct?
> A. Yes.
> Q. And you were charged with an offence under s. 240(1) of the **Excise Act**, charged with 163(1)(b) of the **Excise Act**, and charged with s. 25(1)(b) of the **Tobacco Tax Act**?
> A. Yes.
> Q. And those charges were all dropped?
> A. Yes.
> Q. And as part . . . you agreed to testify in this matter, is that correct, as part of that?
> A. At the time, yes. . . .

The other brother was cross-examined as follows:

> Q. Now you were charged, along with your brother, is that not correct?
> A. Yes.
> Q. In fact, you were charged with three charges?
> A. Yes.
> Q. One under s. 241 of the **Excise Act** and the charge that is presently being heard by this jury. You were also charged under s. 163(1)(b) of the **Excise Act**, is that correct?
> A. I believe so. Yes. I don't know what they mean.
> Q. And you were also charged under the **Tobacco Tax Act**, in that the provincial tax had not been paid on the contraband, is that not correct?
> A. Yes.
> Q. Now you got your truck back?
> A. Yes, I got it back.
> Q. And the charges against you were dropped, is that not correct?
> A. As far as I know, yes.
> Q. And part of the arrangement in dropping the charges against you and your brother were that you were both to give evidence against Robert Hurley, is that not correct?
> A. Yes.

During the course of his summation to the jury, counsel for Mr. Hurley submitted as follows:

> The lynch pin of the Crown's case is Jackie MacDougall. He says he was asked by Robert Hurley to pick up boxes for Albert Taylor. In assessing his evidence I would ask that you consider the following and to consider it carefully. Jackie MacDougall was charged with three separate offences, three. He was charged under s. 161(1)(b) of the **Excise Act**. That's a charge that relates to illegal liquor products. He was charged under s. 25(1)(b) of the **Tobacco Tax Act**, again non-payment of tax on tobacco products; and he was also charged, he was also charged with the same offence that my client is facing, section 240 of the **Excise Act**.

> All three charges were dropped in return for his agreement to testify against Robert Hurley and he suffered absolutely no consequences. A 38-calibre hand gun, a 38-calibre hand gun was found in his garage, and I think his garage is important. He was charged with possession of an unregistered, restricted weapon, contrary to s. 91(1)(a) of the **Criminal Code of Canada** for which he was fined $200, almost like careless and imprudent driving under the **Motor Vehicle Act**, and this was an indictable offence, not an offence punishable by summary conviction. His truck was seized, then returned. . . .

It is pertinent that the trial judge gave the jury a "special warning about the evidence of the MacDougall brothers", counselling the jury to be "extremely cautious in accepting testimony from persons in the position of the MacDougalls" and that it would be "unsafe to rely on their testimony alone".

The penalty to which the MacDougall brothers might have been subject if the Crown proceeded against them, and if they had been convicted, was entirely irrelevant to the issue before the jury, namely the guilt or innocence of Mr. Hurley (see comments of Jones, J.A. in **R. v. Cashin** (1982), 49 N.S.R. (2d) 653 at 662).

The words of Mulock, C.J.O. in **R. v. Cracknell** (1931), O.R. 634 (C.A.) at 636, as approved by the same Court in **R. v. Stevenson** (1990), 58 C.C.C. (3d) 464 at 48, are pertinent:

> Nothing irrelevant or foreign to a case should be allowed to unbalance the Scales of Justice.

Defence counsel had an opportunity, which was exercised in full, of stressing the danger of accepting the evidence of the MacDougall brothers in light of the arrangements with the RCMP.

I would dismiss this ground of appeal.

Fourth Ground of Appeal

Counsel for Mr. Hurley submits that the trial judge reviewed with the jury:

> Only those items of evidence tending to support the Crown's theory of the case and, with the exception of the warning given concerning the testimony of the MacDougalls, wholly failed to refer to any evidence that

> tended to support the defence's contention that they could not safely infer from the circumstantial evidence that the appellant was in constructive possession of the illegal tobacco... The theory of the defence as it appears from counsel's closing address, was quite straight forward: the Crown had not proven its case beyond a reasonable doubt, and there were reasonable inferences to be drawn from the circumstantial evidence other than the guilt of the appellant. It is submitted that it was incumbent upon the trial judge to review the evidence relied upon by the defence to exculpate the appellant in at least as much detail as he reviewed the evidence implicating the appellant.

In summary, counsel submits that Mr. Hurley was entitled to have his defence "fully and fairly put to the jury. That cannot be accomplished unless the evidence that touches on the defence is referred to" (**R. v. Reddick**, (1989), 91 N.S.R. (2d) 361 (S.C.A.D.) at p. 363).

This was not a lengthy trial. The evidence of the Crown witnesses was completed in less than one day. Mr. Hurley did not testify. No evidence was called on his behalf.

The issues were not complex, as demonstrated by the brevity of the Crown's submission to the jury (less than 40 minutes) and the brevity of the defence submission (less than 15 minutes).

The essence of the defence submissions was to point out the failure of the Crown to call evidence respecting title ownership, as well as an attack on the credibility of the MacDougall brothers.

A review of defence counsel's cross-examination of Crown witnesses would suggest the following theory:

- no actual possession of the tobacco by Mr. Hurley was established;
- the Crown failed to establish constructive possession of tobacco;
- the Crown failed to prove any link between the tobacco and Mr. Hurley;
- the Crown failed to establish Mr. Hurley had knowledge of, and control of, the tobacco.

The trial judge clearly recognized these issues, as the following instructions will reveal:

> The charge contains certain essential elements. If you remember I spoke to you before your lunch hour about the essential elements or the essential ingredients. To prove guilt of the accused beyond a reasonable doubt, the Crown must prove each of the essential ingredients beyond a reasonable doubt. The question of possession is the key question for you . . . The third ingredient is that the accused either sells or offers to sell or had in his possession the manufactured tobacco. . . . The facts are, and basically there is no dispute with respect to the ingredients, except the third ingredient that I mentioned, and the real question for you to decide is has the Crown proved beyond a reasonable doubt that the accused had in his possession the manufactured tobacco.

After referring to the definition of possession, contained in s.240 of the **Code**, and advising the jury that there was no evidence of personal, or physical possession, the trial judge then instructed the jury as follows:

> One, that tobacco was in the actual possession or custody of another person in another place; two, the accused knew the tobacco was in the possession or custody of a person in a particular place; three, the accused exercised control of the tobacco while it was in the possession of a person in a particular place. . . . You will have to look at all the surrounding circumstances in order to decide whether or not Mr. Hurley knew the tobacco was in the actual possession or custody of the MacDougalls, or the packages at D&R or in the places from which the products were seized.
>
> It is my urging to you, it is up to you, but it is my urging to you, counsel for the defence in his argument made reference to what the Crown did not prove. My urging would be for you to consider what the Crown did prove, and whether or not you are satisfied, based on that, of guilt beyond a reasonable doubt.

After dealing with the essential parts of the evidence respecting this issue, the trial judge commented:

> Often, during the course of these trials, I ask counsel to set forth their positions. Counsel usually have a theory or a position on the case. The reason I ask for these things is to put the position to the jury at the end of my charge, so the position is given in the words of counsel and not in my words.

The trial judge then placed before the jury the theory of the Crown which occupied approximately one half of one page of the transcript.

He then read to the jury the position placed before him by Mr. Hurley's counsel:

> Issues in Accused, Robert W. Hurley:
>
> 1. Possession - no actual (I take that to mean no actual possession) submitted should be broken down;

> (a) safe - jury may be able to decide contents are in Hurley's possession if they feel Crown has established link between Hurley and the store.
>
> (b) Day & Ross must find knowledge and some element of control.
>
> 2. Evidence of Jackie MacDougall - the jury should be instructed in a manner which I have just instructed you previously on.

Defence counsel in his factum to this Court submits that:

> It must have been obvious to the learned judge that defence counsel did not intend that to be included *verbatim* in the charge. It was no more than a skeletal framework intended, probably, to outline to the learned judge the elements of the defence position defence counsel wished him to explain more fully to the jury. Perhaps counsel misunderstood the learned judge's request for a position statement, but in any event, it is submitted, the learned judge ought not to have included it in his charge as it could only have confused the jury.

It obviously would have been an error for the trial judge to limit his remarks respecting the defence theory, to the cryptic, and somewhat confusing, outline presented to him by defence counsel.

This, however, was not the case.

I am satisfied that the trial judge reviewed the substantial parts of the evidence, and gave the jury the theory of the defence so that it could appreciate the value and effect of that evidence and how the law should be applied to the facts as determined by them (**R. v. Azoulay** (1952) 2 S.C.R. 495 at 497-8).

After reviewing the evidence, the summations of both counsel, and in particular the judge's charge to the jury, I am satisfied that the jury was left in no doubt about the nature of the case, or what it had to decide.

After the charge was completed, the trial judge asked counsel if either of them had any comments. Counsel for the Crown responded that he was satisfied with the charge, and Mr. Hurley's counsel responded "I have no comments".

While such failure to object is not conclusive, it is a factor to be considered (**R. v. Arcangioli**, [1994] 1 S.C.R. 129.

I would dismiss this ground of appeal.

Conclusion

For the reasons set out above I would dismiss the appeal.

Pugsley, J.A.

Concurred in:

Jones, J.A.

Flinn, J.A.

C.A.C. 129111

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ROBERT WALLACE HURLEY Appellant - and - **HER MAJESTY THE QUEEN** Respondent	)	REASONS FOR JUDGMENT BY: PUGSLEY, J.A.

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